

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**JAROD M. GUY**

Claimant

V.

**HARVEY COUNTY**

Respondent

AND

**KANSAS WORKERS RISK COOP FOR COUNTIES**

Insurance Carrier

Docket No. 1,070,680

**ORDER**

Claimant requests review of the December 30, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Claimant appears by James S. Oswalt of Hutchinson, Kansas. Respondent and insurance carrier (respondent) appear by Ronald J. Laskowski of Topeka, Kansas.

**ISSUES**

The ALJ found claimant's employment was terminated for cause and accordingly denied claimant's request for temporary total disability (TTD) benefits.

Claimant argues the evidence does not prove he was terminated for the reasons offered by respondent. Claimant contends because he was not terminated for cause within the meaning of K.S.A. 2013 Supp. 44-510c(b)(2)(C), he is entitled to TTD. Claimant maintains respondent could have, but failed to, continue to accommodate claimant's restrictions.

Respondent argues the Board lacks jurisdiction because the denial of temporary total compensation within the context of a preliminary hearing due to termination for cause is not an issue subject to Board review.

The issues raised are:

1. Is claimant entitled to temporary total disability benefits pursuant to K.S.A. 2013 Supp. 44-510c(b)(2)(C)?

2. Does the Board have jurisdiction to review issue number one at this stage of the proceedings?

**FINDINGS OF FACT**

Under the circumstances of this claim, a detailed summary of the facts is unnecessary. However, the Board specifically notes the following:

Claimant testified that on April 11, 2014, he lifted a 55 gallon trash can into the back of a pickup truck. While doing so, he felt pain in his back. Claimant was sent by respondent to Dr. Michael Williams, who referred claimant to Dr. Thomas Neinke. Claimant testified he was restricted to performing no greater than light duty work, and should not bend, stoop, twist, and lift more than 25 pounds.

Claimant testified respondent offered him an accommodated job that complied with his light duty restrictions. Claimant testified he was able to do the accommodated work.

Claimant testified that on July 11, 2014, he received a letter from respondent terminating his employment.

Kass Lee Miller, respondent's director of parks, testified claimant was terminated for an accumulation of tardiness, absenteeism and insubordination. Claimant denied his employment was terminated for cause, and argued if his employment had not been terminated, he would have continued to perform the accommodated job.

Claimant has not engaged in gainful employment since respondent fired him.

**PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2013 Supp. 44-510c(b)(2)(C) states:

If the employee has been terminated for cause . . . following a compensable injury, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.

K.S.A. 2013 Supp. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose

out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 2013 Supp. 44-551(l)(2)(A) states, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 2013 Supp. 44-534a(a)(2) grants a judge jurisdiction to decide issues concerning payment of medical compensation and temporary total disability compensation. K.S.A. 44-534a also specifically gives the judge authority to grant or deny a request for TTD pending a full hearing on the claim. "Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly."<sup>1</sup>

Not every alleged error in law or fact is subject to review. On an appeal from a preliminary hearing Order, the Board can review only allegations that the judge exceeded his or her jurisdiction under K.S.A. 2013 Supp. 44-551 and the jurisdictional issues listed in K.S.A. 44-534a(a)(2): (1) did the worker sustain an accident, repetitive trauma or resulting injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.<sup>2</sup>

The Board has no jurisdiction to review the issue raised by claimant. The issue is not included in those issues specifically set forth on K.S.A. 44-534a. The ALJ is granted authority to grant or deny TTD. The ALJ did not exceed his jurisdiction in ruling on claimant's request for preliminary relief. Whether the ALJ's denial of TTD is or is not correct is immaterial at this stage of the proceedings.

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<sup>1</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P. 2d 552, rev. denied 221 Kan. 757 (1977).

<sup>2</sup> See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>3</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

1. The Board lacks jurisdiction to review whether the ALJ erred in denying claimant's request for temporary total disability benefits pursuant to K.S.A. 2013 Supp. 44-510c(b)(2)(C).

2. Claimant's request for Board review is therefore dismissed for lack of jurisdiction.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the preliminary hearing Order of Administrative Law Judge Thomas Klein dated December 30, 2014, is dismissed for lack of jurisdiction.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April, 2015.

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HONORABLE GARY R. TERRILL  
BOARD MEMBER

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Honorable Thomas Klein, Administrative Law Judge

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<sup>3</sup> K.S.A. 2013 Supp. 44-534a.